COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

CASE NO.2015-SC-000570

DENNIS CHAMPION — APPELLANT

v.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2015-CA-000886
FAYETTE CIRCUIT COURT CASE NO. 15-XX-000006
FRANKLIN CIRCUIT COURT NO. 06-CI-00554

COMMONWEALTH OF KENTUCKY — APPELLEE

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

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Certificate of Service

The undersigned certifies that copies of this brief and accompanying motion were sent to the following named individuals via first class mail postage prepaid on Friday, July 1, 2016: Hon. Kimberly Bunnell, Judge, Fayette Circuit Court, Robert F. Stephens Courthouse, 120 N. Limestone, Suite 521, Lexington, KY 40507; Hon. Joseph T. Bouvier, Judge, Fayette District Court, 150 N. Limestone, Lexington, KY 40507; Ray Larson, Fayette Co. Commonwealth's Attorney, 116 N. Upper Street, Lexington, KY 40507; Jason Rothrock, Assistant Fayette Co. Attorney, 110 W. Vine Street, Lexington, KY 40507; Linda Roberts Horsman and Carmen Ross, Assistant Public Advocates,

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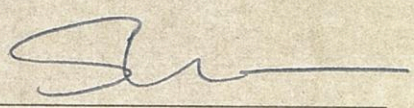

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STATEMENT OF POINTS AND AUTHORITIES

SUMMARY OF ARGUMENT

The Circuit Court below found that Lexington-Fayette Urban County Government ("LFUCG") Ordinance 14-5, which prohibits begging and solicitation upon public streets and their intersections, does not violate the First Amendment's Free Speech Clause. [Op. and Order, 5-11.] In doing so, however, the Circuit Court erred because the ordinance — which criminalizes speech on the basis of its content occurring in traditional public fora — is not narrowly tailored to achieve a compelling governmental interest: the level of scrutiny reserved for such content based speech restrictions. Alternatively, even if the ordinance is a content neutral speech regulation and less rigorous "intermediate scrutiny" applies, the ordinance nonetheless fails constitutional scrutiny because it burdens substantially more speech than is necessary and does not leave open ample channels of communication. As a result, the Circuit Court's ruling must be reversed and Ordinance 14-5 must be declared facially invalid.

ARGUMENT

I. BEGGING IS PROTECTED SPEECH UNDER THE UNITED STATES CONSITUTION.

The First Amendment of the U.S. Constitution, which applies to the states by operation of the Fourteenth Amendment, prohibits laws "abridging the freedom of speech." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (quoting U.S. Const., Amend. I). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U. S. 92, 95 (1972). This limitation also pertains to municipal governments that are vested with state authority. *Reed*, 135 S. Ct. at 2226.

The U.S. Supreme Court has long recognized that charitable solicitations fall within the realm of the First Amendment and must be protected. *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 633 (1980) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977)). This is because "charitable appeals for funds, on the street or door to door, involve a variety of speech interests -- communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." *Id.* at 632. Indeed, "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease." *Id.* As such, it plays an important role in our society and is close to the very heart of the First Amendment. *Id.*

While the U.S. Supreme Court has not directly held that charitable solicitations by individuals enjoy the same level of constitutional protection as those made on behalf of organizations, several federal circuit courts have correctly concluded that they do. *See Speet v. Schuette*, 726 F.3d 867, 875 (6th Cir. 2013); *Loper v. New York City Police Dept.*, 999 F.2d 699, 704 (2d Cir. 1993); *Clatterback v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir 2013); *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000). As the Sixth Circuit recognized, "'the Court's analysis in *Schaumburg* suggests little reason to distinguish between beggars and charities in terms of the First Amendment protection for their speech.'" *Speet v. Schuette*, 726 F.3d 867, 875 (6th Cir. 2013) (*quoting Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000)). Certainly, it is difficult to discern any significant difference between soliciting for the needs of an organization versus those of

an individual. *See Loper*, 999 F.2d at 704; *Speet*, 726 F.3d at 877 ("'[B]egging is indistinguishable from charitable solicitation for First Amendment purposes. To hold otherwise would mean that an individual's plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group.'" (*quoting Young v. New York City Transit Authority*, 903 F.2d 146, 167 (2d Cir. 1990) (dissent))). And while begging in public fora may be unpopular with some, particularly government officials, "the First Amendment guarantees [individuals'] right to be there, deliver their pitch and ask for support." *Gresham*, 225 F.3d at 904. Thus, solicitations for alms by Mr. Champion and others in Lexington constitutes speech that must be afforded First Amendment protection; thus, any such regulation of that speech must meet exacting scrutiny.

II. THE ORDINANCE REGULATES SPEECH IN TRADITIONAL PUBLIC FORA ON THE BASIS OF ITS CONTENT AND FAILS STRICT SCRUTINY.

Lexington-Fayette Urban County Ordinance 14-5 states that "No person shall beg or solicit upon the public streets or at the intersection of said public streets within the urban county area." There can be no reasonable dispute that the ordinance thus regulates speech in areas deemed traditional public fora. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Public streets "'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Indeed, these areas hold a "'special position in terms of First Amendment protection'" because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014)

(quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). As the U.S. Supreme Court recently recognized, the value of the public forum is beyond measure:

> Even today, [public fora] remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984), this aspect of traditional public fora is a virtue, not a vice.

Id.

Given the deep significance of the public forum, "the rights of the State to limit expressive activity [in public streets is] sharply circumscribed." *Perry*, 460 U.S. at 45. The most important factor in determining whether a regulation on speech in a public forum is constitutional is whether the regulation is content-based. If the regulation is content-based, meaning that it "target[s] speech based on its communicative content," then it is presumptively unconstitutional and will be upheld only if the government "proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). If the regulation is content-neutral, the government may impose time, place, and manner restrictions as long as they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45. Thus, an analysis of the constitutionality of Ordinance 14-5 begins with a determination of whether the statute is content-based. For the reasons that follow, Ordinance 14-5 is content-based and, as such, cannot withstand strict scrutiny.

A. The ordinance is a content-based regulation of speech that is not narrowly tailored to achieve any compelling governmental interest.

One of the most sacred principles of the First Amendment is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Furthermore, it is not the role of the government to "selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others." *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975). Here, Ordinance 14-5 is a content based restriction because, on its face, it singles out speech for punishment based upon its particularized message, *i.e.*, speech that conveys a request for financial assistance.

This conclusion is confirmed by examining the U.S. Supreme Court's recent decision in *Reed* in which the Court, in analyzing a municipal sign ordinance for content neutrality, held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. Thus, if the disputed regulation makes "distinctions based on the message a speaker conveys," then it is content-based. *Id.* These facial distinctions can be subtle, such as where the regulated speech is defined "by its function or purpose." *Id.* A regulation can also be content-based if the law cannot be "'justified without reference to the content of the regulated speech'" or where the law was adopted by the government because of disagreement with the speech's message. *Id.* (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Here, Ordinance 14-5 bars only speech that communicates a request for financial assistance (whether termed begging or solicitation) and cannot be justified without reference to the content of that speech, thus it is a content based regulation.

The cases cited by the Circuit Court in support of its finding of content neutrality are not controlling in this case. [Op. and Order, 8-9.] For example, the Circuit Court cited *Int'l Soc. for Krishna Consciousness, Inc. v. Baton Rouge*, 876 F.2d 494 (5th Cir. 1989). [Op. and Order, 9.] But *Baton Rouge* is a pre-*Reed* case in which the Fifth Circuit concluded that a solicitation ban in a national park was content neutral. *Id.* at 497. This is in contradiction to the standard laid out in *Reed*, as discussed above. The Fifth Circuit did not analyze whether the regulation prohibited discussion on an entire topic, as the *Reed* Court mandates as the correct test of content neutrality. Notably, two other cases cited by the Circuit Court to support its conclusion that the ordinance is content neutral—*Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), and *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014)—were reversed after the *Reed* decision was handed down for incorrectly finding content neutrality. [Op. and Order, 8 *Thayer v. City of Worcester, Mass.*, 135 S. Ct. 2887 (2015); *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015), *cert. denied,* 136 S. Ct. 1173 (2016). Further, in *Ass'n of Cmty. Orgs. for Reform Now v. St. Louis Cty.*, 930 F.2d 591 (8th Cir. 1991) and *United States Labor Party v. Oremus*, 619 F.2d 683 (7th Cir. 1980), content neutrality was not analyzed by the courts but either assumed or stipulated to by the parties. Finally, the regulation deemed content-neutral in *Iskcon of Potomac, Inc. v. Kennedy*, 61 F.3d 949 (D.C. Cir. 1995), was assessed under an agency's interpretation of the solicitation ban as applying only to in-person solicitations for immediate donations. Given this limiting construction by the agency, the court concluded that the regulation constituted a content neutral regulation on the manner in which solicitations may be made. *Id.* at 955. By contrast,

there is no such interpretive gloss on Ordinance 14-5 and, even if there were, *Reed* likely renders *Kennedy*, at best, unpersuasive authority.

Similarly, the Circuit Court erred by placing great weight on the fact that "the ordinance's main objective is roadway safety, not suppression of undesirable speech." [Op. and Order, 7.] But "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' within the regulated speech." *Reed*, 135 S. Ct. at 2228 (*quoting Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). Thus, the Court must "consider[] whether a law is content neutral *before* turning to the law's justification or purpose." *Id.* Stated plainly, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.*

This First Amendment principle is important because "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* That is why the Constitution focuses on the operation of laws and not the intent of those that passed them. *Id.* As a result, the U.S. Supreme Court has repeatedly refused to endorse the argument that "'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Id.* (*quoting Discovery Network*, 507 U.S. at 429). It was error, then, for the Circuit Court to find that the "principal inquiry" in determining content neutrality is "'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'" Opinion and Order at p. 7 (*quoting Ward v. Rock Against Racism*, 49 U.S. 781, 791 (1989)).

Because Ordinance 14-5 is content-based, it is constitutional only if it can survive strict scrutiny. Under strict scrutiny, LFUCG has the burden to show that Ordinance 14-5 "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed*, 135 S. Ct. at 2231.

LFUCG has offered traffic safety as the governmental interest supporting Ordinance 14-5. Assuming that LFUCG's stated interest, at that level of generality, satisfies the compelling governmental interest prong, LFUCG must nonetheless narrowly tailor any speech regulations adopted to further that interest. Here, LFUCG has not done so. Specifically, Ordinance 14-5's regulation of speech is both underinclusive and overinclusive for the stated purpose of promoting traffic safety. It is underinclusive in that it does not prohibit other forms of speech that would potentially disrupt traffic in the regulated areas, such as requests to sign political petitions, open-air preaching, political protests, or asking for directions. And Ordinance 14-5 is overinclusive in that it bars a substantial amount of speech that does not interfere with traffic or traffic safety. For example, a citizen standing at an intersection cannot solicit donations from a nearby pedestrian. In sum, because of the underinclusiveness and overinclusiveness of Ordinance 14-5, LFUCG cannot meet its burden of proving that the ordinance is narrowly tailored to further a compelling government interest. Thus, the ordinance fails strict scrutiny.

B. Even if the ordinance is content-neutral, it does not pass intermediate scrutiny.

Even if Ordinance 14-5 is content neutral, it still must pass intermediate scrutiny, which puts the burden on LFUCG to show that the ordinance is "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781,

796 (1989). "For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014) (*quoting Ward*, 491 U.S. at 799). The government may not simply burden speech for convenience or efficiency. *Id.* at 2534. Further, while the regulation does not need to be the least restrictive option, the government still cannot "'regulat[e] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *Id.* at 2535 (*quoting Ward*, 491 U.S. at 799). The regulation must also "'leave open ample alternative channels for communication of the information.'" *Id.* at 2529 (*quoting Ward*, 491 U.S. at 799).

As explained above, Ordinance 14-5 is not narrowly tailored, and it and imposes serious burdens on speech. Moreover, the ordinance leaves few alternative channels open for begging and solicitation particularly in the downtown area. An adequate "alternative channel of communication" must be more than merely "theoretically available. It must be realistic as well." *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) (citing *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977)). Moreover, the restriction on speech "cannot totally foreclose a speaker's ability to reach one audience even if it allows the speaker to reach other groups." *Gresham*, 225 F.3d at 906 (citing *Berry v. City of New York*, 97 F.3d 689, 698 (2nd Cir. 1996)).

The Circuit Court pointed to three alternative channels for individuals' solicitations – parks, sidewalks, and private property. Neither parks nor private property provide truly adequate alternatives: access to private property is controlled by the property owner and parks do not provide comparable opportunities for solicitation given

their relative scarcity when compared to the vast amount of public fora space governed by Ordinance 14-5. Moreover, sidewalks are likewise significantly limited in their frequency as compared to the amount of public fora covered by the ordinance. Thus, the proffered alternative channels are inadequate to justify the breadth of the ordinance's regulation of speech in public fora.

CONCLUSION

Ordinance 14-5 is content-based on its face and cannot withstand strict scrutiny. As such, it is unconstitutional under the First Amendment of the U.S. Constitution and must be repealed.

Respectfully submitted,

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